

PATENT COOPERATION TREATY

From the
INTERNATIONAL SEARCHING AUTHORITY

To:

see form PCT/ISA/220

WRITTEN OPINION OF THE INTERNATIONAL SEARCHING AUTHORITY (PCT Rule 43bis.1)

Applicant's or agent's file reference
see form PCT/ISA/220

International application No.
PCT/EP2005/001614

International filing date (day/month/year)
17.02.2005

Priority date (day/month/year)
01.03.2004

International Patent Classification (IPC) or both national classification and IPC
A23G9/02, A23L1/308, A23L1/30

Applicant
NESTEC S.A.

Date of mailing
(day/month/year) see form PCT/ISA/210 (second sheet)
03/06/05

FOR FURTHER ACTION

See paragraph 2 below

1. This opinion contains indications relating to the following items:

- Box No. I Basis of the opinion
- Box No. II Priority
- Box No. III Non-establishment of opinion with regard to novelty, inventive step and industrial applicability
- Box No. IV Lack of unity of invention
- Box No. V Reasoned statement under Rule 43bis.1(a)(i) with regard to novelty, inventive step or industrial applicability; citations and explanations supporting such statement
- Box No. VI Certain documents cited
- Box No. VII Certain defects in the international application
- Box No. VIII Certain observations on the international application

2. FURTHER ACTION

If a demand for international preliminary examination is made, this opinion will usually be considered to be a written opinion of the International Preliminary Examining Authority ("IPEA"). However, this does not apply where the applicant chooses an Authority other than this one to be the IPEA and the chosen IPEA has notified the International Bureau under Rule 66.1bis(b) that written opinions of this International Searching Authority will not be so considered.

If this opinion is, as provided above, considered to be a written opinion of the IPEA, the applicant is invited to submit to the IPEA a written reply together, where appropriate, with amendments, before the expiration of three months from the date of mailing of Form PCT/ISA/220 or before the expiration of 22 months from the priority date, whichever expires later.

For further options, see Form PCT/ISA/220.

03.09.05

01.09.05

3. For further details, see notes to Form PCT/ISA/220.

Name and mailing address of the ISA:



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No reply to be submitted
in international phase
13.07.05



**WRITTEN OPINION OF THE
INTERNATIONAL SEARCHING AUTHORITY**

International application No.
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Box No. I Basis of the opinion

1. With regard to the language, this opinion has been established on the basis of the international application in the language in which it was filed, unless otherwise indicated under this item.
 - This opinion has been established on the basis of a translation from the original language into the following language , which is the language of a translation furnished for the purposes of international search (under Rules 12.3 and 23.1(b)).
2. With regard to any nucleotide and/or amino acid sequence disclosed in the international application and necessary to the claimed invention, this opinion has been established on the basis of:
 - a. type of material:
 - a sequence listing
 - table(s) related to the sequence listing
 - b. format of material:
 - in written format
 - in computer readable form
 - c. time of filing/furnishing:
 - contained in the international application as filed.
 - filed together with the international application in computer readable form.
 - furnished subsequently to this Authority for the purposes of search.
3. In addition, in the case that more than one version or copy of a sequence listing and/or table relating thereto has been filed or furnished, the required statements that the information in the subsequent or additional copies is identical to that in the application as filed or does not go beyond the application as filed, as appropriate, were furnished.
4. Additional comments:

Box No. II Priority

- The validity of the priority claim has not been considered because the International Searching Authority does not have in its possession a copy of the earlier application whose priority has been claimed or, where required, a translation of that earlier application. This opinion has nevertheless been established on the assumption that the relevant date (Rules 43bis.1 and 64.1) is the claimed priority date.
- This opinion has been established as if no priority had been claimed due to the fact that the priority claim has been found invalid (Rules 43bis.1 and 64.1). Thus for the purposes of this opinion, the international filing date indicated above is considered to be the relevant date.
3. Additional observations, if necessary:

see separate sheet

**WRITTEN OPINION OF THE
INTERNATIONAL SEARCHING AUTHORITY**

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**Box No. V Reasoned statement under Rule 43bis.1(a)(i) with regard to novelty, inventive step or
industrial applicability; citations and explanations supporting such statement**

1. Statement

Novelty (N)	Yes:	Claims	2-4,7-11
	No:	Claims	1,5,6
Inventive step (IS)	Yes:	Claims	3,4,8,9,11
	No:	Claims	1,2,5-7,10
Industrial applicability (IA)	Yes:	Claims	1-11
	No:	Claims	

2. Citations and explanations

see separate sheet

WRITTEN OPINION OF THE
INTERNATIONAL SEARCHING
AUTHORITY (SEPARATE SHEET)

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Re: Item II

The present application claims priority to EP 04 004755 (filed 01.03.2004).

However, for a valid priority, the requirements of Art. 28(2), 41(2) PCT, respect. 123(2) EPC must be fulfilled, which is not the case for the following points:

- 1 The present application refers to a specific 'heat shock cycle' (page 5, and Table on page 5), which was not disclosed in the priority document.
- 2 The technical information on page 8 ("having resistance to shrinkage) at room temperature" [priority doc.] was changed to ("having resistance to shrinkage) after 4 cycles of heat shock as defined hereinbefore" [emphasis added].

As technical information this 'heat shock cycle' and the effects due to application of said 'heat shock cycle' may be submitted as further information in the patent examination process, but only outside the patent application documents, such as in a letter of reply to an EPO communication.

Since the above mentioned 'heat shock cycle' and its effects were not mentioned in the priority document, and now they are part of the patent application document, 28(2), 41(2) PCT, respect. 123(2) EPC are violated (see also EPO Guidelines part C, chapter VI, point 9.1.4).

Claim 9 has been changed from " (...) homogenizing is carried out at about 60°C at a pressure of about 180 bar" to " (...) homogenizing is carried out at about 70°C at a pressure of about 120 to 180 bar" (Art. 28(2), 41(2) PCT, respect. 123(2) EPC).

4 On page 7 of the present application the result of the regular ice cream is "regular ice cream rating 4", whereas in the claimed priority document - with other data being identical - it is stated the result of the regular ice cream is "regular ice cream rating 5", see page 6 of priority document.

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2003 (2003-06-19)
1998 (1989-12-24)
; used or not,
; not involved in the
; not involve an

"L A ET AL: "Viscosity
Hed to Inulin content"
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FORMATION SERVICE
technological and
8572 Database

FORMATON SERVICE
AL: "Rheological
XP002328573

Ich is one of the
ion of the
; hence more
lines 6 - 14);

D3 to D5.

; stable (=
is then dehydrated.
duce the frozen
/ over time, hence a
The overrun is
e tablets 5 and 6)
getable fibre
e fat, (about 5 or about
); and stabilizer
ver D2.

2.3 The use of vegetable fibre (as defined in claim 11) in combination with a polyol for the purpose of improving softness and stability against shrinkage in an ice confection which contains 5 to 20% by weight fat, has neither been disclosed directly, nor is obvious from the prior art documents.

Independent claim 11 is considered novel and inventive.

3 Other

3.1 Clarity / relative term "resistance to shrinkage"

Shrinkage in aerated, frozen confection products depends **essentially** on the environmental conditions (temperature, time/duration [at given temperature], pressure [changes], and other).

The feature "resistance to shrinkage" is not sufficiently clear (from the application as originally filed) as to define the extend of a patent claim (Art. 6 PCT / 84 EPC).

Said feature, as any feature in the claims, must be sufficiently clear, that is a skilled person has to be able to determine without undue burden if any other subject matter (e.g. prior art, or future development) does or does not fall into the extend of a patent.

Neither from the application as originally filed, nor from the state of the art (there is no standard method for determination of shrinkage), is it possible to determine in a clear and precise way, if an aerated frozen confection is 'resistant to shrinkage' or is not 'resistant to shrinkage'.

3.2 Relative term "soft"

The term 'soft' is not precise enough to define the extend of a patent claim, Art. 6 PCT / 84 EPC (see also EPO Guidelines part C, chapter III, point 4.5).

The applicant may overcome this objection by specifying the term 'soft' in the claims

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by information from the description as originally filed, for example 'soft to be scoopable'.

3.3 Clarity / Inconsistency (Art.6 PCT / 84 EPC)

Claim 7 is about a method for producing a confection, however the last step (hence the resulting product) is "packaging and hardening the mix".

3.4 Relevant prior art

Documents D1 and D2 are considered to be relevant pieces of the prior art. They should be cited in the description and their relevance towards the present application should be briefly stated (Rule 27 (1) b EPC).

3.5 Possible future amendments

If new claims are filed, the description should be adapted accordingly.

In order to facilitate examination of conformity of any amendments with the requirements of Art. 28(2), 41(2) PCT, respect. 123(2) EPC, the applicant is requested to clearly identify all amendments, whether there are amendments by addition, replacement, combination (e.g. of claims) or deletion.

The applicant should indicate in detail the passages in the application as filed, on which these amendments are based on (Guidelines E-II, 1).